et al.; 357 Pa. 326 (1947), and in the case of Schenck vs. Pittsburgh *et al.;* 364 Pa. 31 (1950) had considered and passed upon the matters pleaded in Plaintiff's Complaint adversely to Plaintiff.

3. In granting the Defendants' Motion to Dismiss the Complaint based upon a holding that the United States Supreme Court's decision in the case of United States *ex rel.* T. V. A. vs. Welch, 327 U. S. 546 (1946), precluded this Court from judicially reviewing the question of the Federal constitutionality of the Urban Redevelopment Law of Pennsylvania, the Federal constitutionality of its administration, the arbitrariness of its administration, or the capriciousness of its administration as pleaded in Plaintiff's Complaint.

4. In denying Plaintiff's request for a temporary restraining Order.

5. In denying Plaintiff's request for an Interlocutory Injunction.

ARGUMENT.

The provisions of the Urban Redevelopment Law having been fully setforth in previous pleadings, as well as in Plaintiff's statement of the case contained herein, we will confine ourselves in this argument to the basic questions involved which arise out of that Act, and the administration thereof, as related to the so-called "Gateway Center Project" in the City of Pittsburgh.

I.

The Urban Redevelopment Law of Pennsylvania, *supra,* as applied to the factual situation herein presented, is unconstitutional under the provisions of the 14th Amendment

of the United States in that it permits the taking of private property for other than a public use or purpose.

The questions of the unconstitutionality of the Pennsylvania Urban Redevelopment Law and of the unconstitutionality of its administration in the particular case before this Court are, in many respects, so interwoven as to defy separate discussion. The right of this Court to review each of these questions, however, is beyond argument, Cincinnati vs. Vester, 281, U. S. 439; Oklahoma Gas Company vs. Russell, 261, U. S. 293; *ex parte* Young, 209 U. S. 123.

As pointed out in Appellant's jurisdictional statement, the question of the constitutionality of the Redevelopment Law under the constitution of the Commonwealth of Pennsylvania has been before the Supreme Court of Pennsylvania in two cases, viz., Belovsky vs. Redevelopment Authority of the City of Philadelphia, 357 Pa. 329, and Schenck vs. Pittsburgh *et al.*, 364 Pa. 31. In the Belovsky case the Court, having no specific redevelopment project before it, and viewing the fundamental purpose of the Act as "the clearance of slum areas" held that the clearance, reconstruction and rehabilitation of a blighted area as defined in the Act accomplished a public purpose and that what followed such rehabilitation was of no consequence under the Pennsylvania Constitution. As an abstract statement of law, such a decision is justifiable but as applied to the property in the redevelopment project involved in this case, in so far as the allegations made in Appellant's Complaint are concerned, it is in no sense controlling. In the Schenck case, *supra*, which was, to state it mildly, a friendly suit, the constitutionality of the Pennsylvania Urban Redevelopment Law was upheld as to the area in which Appellant's property is located, first on the basis that the decision in the Belovsky case controlled the question of State con-

stitutionality, and, secondly, on the basis that there was no allegation in the pleadings and no evidence (in a record devoid of testimony) that the City Planning Commission did not act in good faith in certifying the area designated by it as blighted. Appellant submits that neither of these cases control the questions presented by this appeal.

The instant case, insofar as research of counsel indicates, is the first of its kind to come before this Court, as well as the first of its kind to come before the State courts of Pennsylvania. Unlike the Belovsky case, it raises the question of the constitutionality of the Act as applied to a particular property within a redevelopment project area. Unlike the Schenck case, it specifically raises the question which the Supreme Court of Pennsylvania was so careful to except in its decision in that case, viz., the questions of arbitrariness and capriciousness in the certification of the appointive administrative agency involved. It is unlike any case heretofore litigated on the question of urban redevelopment projects in that it raises for the first time an intricate legal problem that may be simply stated thusly:

> "Where a property owner, by written complaint filed, asserts without formal denial that a state statute of general application throughout such state is being exercised or applied in such an arbitrary, capricious and illegal way as to result in the taking, through the power of eminent domain, of her real property for the private use of another, has she started such a *prima facie* case as to entitle her to judicial review of her allegations that to permit such taking of her property, would constitute a deprivation of her right to due process and equal protection of the laws under the 14th Amendment to the Constitution of the United States?"

We submit that the peremptory dismissal of plaintiff's complaint, without the taking of any testimony and without hearing in the court below was erroneous and requires the

dismissal by your Honorable Court of Defendants-Appellees' motion to affirm.

We fully recognize, as stated in our Jurisdictional Statement, that the doctrines of public use and public purpose have been denied considerably; we fully realize that this Court, as well as many others, has frequently held that it is not essential that the entire community, nor even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. Neither of these facts, however, negatived appellant's position that a municipal body can not, through arbitrary, capricious certification of blight in an area where blight is non-existent, thereby justify a taking of private property of one in order to transfer it to a multi million dollar business corporation for its own private uses, and this on the ground that the removal of the (non-existent) blight constitutes the necessary public purpose. This is not a case where a hearing has been held and a record made so that a fair judicial ascertainment of a property owner's allegation of the non-existence of blight could be had; this is not a case where such property owner has been unable, after opportunity given, to carry the burden of proof in sustaining such allegations; this is a case where such a property owner, with such allegations uncontradicted by formal denial, has been refused any chance whatsoever to sustain her allegations, through the summary dismissal of her complaint. It is axiomatic that facts well pleaded are admitted upon argument of a motion to dismiss; how, then, can this appellant be denied her right to her day in court where a substantial, basic federal constitutional question is involved and the arbitrary, capricious and illegal, action of an appointive administrative body is alleged.

Appellees have in their Motion to Affirm, cited numerous cases intended to sustain their position that the questions involved in this case are so unsubstantial as not to need further argument and that the taking involved is for a public use. Bearing in mind that appellant has been refused any chance whatsoever to sustain her allegations, and realizing that what is here attacked by appellant is the administration of the Pennsylvania Urban Redevelopment Law under the particular factual situation set forth in her complaint, it is respectfully stated that none of the citations buttress appellees' contentions. The Belovsky and Schenck cases, *supra,* have been distinguished both in this argument and in the Jurisdictional Statement filed. The Federal Court decisions cited are clearly distinguishable, and, of utmost significance, not a single one of such citations impairs, in the slightest degree, the constitutional prohibition against the taking of private property for private use. In every one of such cases, a generally admitted and accepted public purpose can be found. These cases have been cited by appellees:

1. Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, a case involving western agricultural development on a broad basis, clearly a public purpose question.

2. Clark v. Nash, 198 U. S. 361; involving a similar matter to 1, *supra;*

3. Strickley v. Highland Boy Mining Co., 200 U. S. 527, development of mineral resources, again a public purpose question;

4. Hairston v. Danville & Western Railway, 208 U. S. 598, railroad and transportation development;

5. Union Line Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211; railroad spur tracks of a common carrier;

6. Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30; condemnation of property for water power purposes;

7. Joslin Co. v. Providence, 262 U. S. 665; involving public access to water supply;

8. Rindge Co. v. Los Angeles County, 262 U. S. 700; involving general public travel in motor cars for health and recreation on a disputed highway;

9. People of Puerto Rico v. Eastern Sugar Associates, 156 F. 2d 316, *cert. den.* 329 U. S. 772; a case which admittedly went farther in its conclusions than its predecessors but only upon the logical basis that the power of eminent domain may be exercised by a government where the taking is necessary for the continued economic vitality of the entire country;

10. Matter of Murray v. La Guardia, 291 N. Y. 320, *cert. den.* 321 U. S. 771; a housing case in which the need of ill housed families for decent living conditions required the use of the power of eminent domain to obtain space to build same, undisputably a public purpose; and,

11. U. S. v. Boyle, 52 F. Supp. 906; affirmed *sub nom* City of Cleveland v. U. S., 323 U. S. 329; again a public housing case, and having no relation to a commercial venture under the guise of (non-existent) blight.

As distinguished from the above citations, appellants' position, bearing in mind her uncontroverted allegation of non-existence of blight as to property taken solely under an alleged public purpose of removal of blight, is clearly sustained by numerous decisions. Obviously, if the public purpose asserted is the removal of blight, and in fact, (as must be assumed in the present state of the record), no blight exists, the asserted public purpose disappears and the status of the parties changes to a situation where the

private property of one is taken for the private use of another. This is expressly prohibited by the provisions of the 14th Amendment.

"The public use requirement of the 5th Amendment—has been read into the due process clause of the 14th Amendment" (People of Puerto Rico v. Eastern Sugar Associates, *supra; Fallbrook Irrigation District v. Bradley,* 164 U. S. 112; *Clark v. Nash,* 198 U. S. 361. Some public benefit or advantage must accrue from the transfer and mere financial gain to the taker is not enough, since the Supreme Court has intimated that the power of eminent domain cannot be used by the taking authority in aid of an "outside land speculation"; *(Brown v. United States,* 263 U. S. 78), which this clearly is.

In Missouri Pacific Railway Co. v. Nebraska, 164 U. S. 417, a writ of error was brought to review the judgment of the Supreme Court of Nebraska awarding a writ of mandamus to compel the railway company to comply with an order of the Nebraska State Board of Transportation, directing the company to grant to individuals the right and privilege of erecting an elevator upon the grounds of the company. Your Honorable Court reversed the Nebraska court, holding that the order was, in essence and effect, a taking of private property for the private use of petitioners, and that the taking by a state of the private property of one person or corporation, without the owners' consent, for the private use of another, is not due process of law and is a violation of the 14th Amendment of the Constitution of the United States, citing therein, Davidson v. New Orleans, 96 U. S. 97, 102; Cole v. La Grange, 113 U. S. 1.

And in Cincinnati v. Vester, 281 U. S. 439, it was stated:

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation

> of private property, the question of what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

After thorough search, we believe it fair to state that the nearest case in principle to the one now before this Court is that of Opinion Of The Justices, 204 Mass. 607, a case frequently cited in the Reports of your Honorable Court and referred to in the case of Brown vs. U. S. 263, U. S. 78, referred to in Appellee's Motion. In the Justices's case, the specific question involved was stated thusly

> "Is it within the constitutional power of the Legislature to authorize the city of Boston, or such other public authority as the Legislature may select, to lay out such a thoroughfare and rear streets, and to take not only the land or easements necessary for the same, but also such quantities of land on either side of said thoroughfare or between the same and said rear streets, as may be reasonably necessary for the purposes hereinbefore set out, with a view to the subsequent use by private individuals of so much of the property taken as lies on either side of said thoroughfare, under conveyances, leases, or agreements which shall embody suitable provisions for the construction on said land of buildings suited to the objects and purposes hereinbefore set out, and for the use, management and control of said lands and buildings in such manner as to secure and best promote the public interests and purposes hereinbefore referred to; assuming that the act provides just compensation for all persons sustaining damage by the said takings?"

The Court's opinion on that case, in part, reads as follows:

"The question seems to relate particularly to the power of the Legislature to take and use land outside of the proposed thoroughfare, for purposes which have no direct relation to the construction or use of the street for travel. It is presented upon the hypothesis that the desired facilities for the profitable use of the land can be secured only by the coliteration in whole or in part of the present lines of individual ownership along the street, the concentration, through the exercise of the power of eminent domain, of these abutting estates, in parcels of suitable size and shape, and the development or use of such parcels for warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The question is whether such land can be taken with a view to the subsequent use of it by private individuals, under conveyances, leases or agreements which shall embody suitable contracts for the construction on the land of buildings adapted to use in domestic and foreign trade and commerce, and for the use, management and control of the lands and buildings in such manner as to secure and promote such trade and commerce. The proposed legislation to which the inquiry relates, necessarily would contemplate action by the city in the procurement, management and control of land along a street within the city, for no other purpose than to induce and promote a use of it by merchants or traders. It would contemplate a taking of private property in the exercise of the right of eminent domain, and an expenditure of money to pay for it and fit it for occupation.

It is a rule of law universally recognized in this country, that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use. The city can-

not be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. It could as well tax them to raise money to carry on any other private business with a hope of gain. Such proceedings are entirely outside the functions of a State or of any subdivision of a State.

"It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public but a private use of the real estate. In Lowell vs. Boston, 111 Mass. 454, after the great fire of 1872 which destroyed all the buildings in an important part of Boston, it was decided that a statute authorizing the city to borrow money on bonds and lend it on mortgages to the owners of land whose buildings had been burned, was unconstitutional. The lending of such money presumably would have promoted building and the transaction of business in the devastated district, but the benefit to the public would not have been direct, but only incidental. The court said, speaking by Mr. Justice Wells at p. 461: 'The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.' This statement of the law is clear and accurate. It has governed all later

decisions upon kindred questions in this Commonwealth. Opinion of the Justices, 155 Mass. 598. Mead vs. Acton, 139 Mass. 341. It is the law of the Supreme Court of the United States as laid down in an able and exhaustive opinion by Mr. Justice Miller, in Loan Association vs. Topeka, 20 Wall. 655, in which it was held that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise was invalid. It has been followed by that court in later cases. Parkersburg vs. Brown, 106 U. S. 487, Cole vs. LaGrange, 113 U. S. 1".

This case almost exactly describes the kind of taking involved in plaintiff-appellant's case. For the Court said:

"An affirmative answer to this question would make it possible for the City to take the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the City, some other use of the land would be more profitable, and—would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain has been justified on such grounds." (Pages 613-14).

In arriving at its decision on the validity of Massachusetts of legislation in Allydonn Realty Corporation vs. Holyoke Housing Authority, 304 Mass. 288; 23 NE 2d 665, the Supreme Court of Massachusetts recently said, in citing the Justice's opinion that

"That case dealt with a purely commercial venture."

No more apt words can be used to describe the taking in the present case.

In Thompson vs. Consolidated Gas Utilities Corporation, 300 U. S. p. 78 the question involved was the validity of an administrative order prorating the production of natural gas. The Court said:

"Our law reports present no more glaring instance of the taking of one man's property and giving it to

another. In Missouri P. R. Co. vs. Nebraska, 164 U. S. 403; Missouri Pac. R. Co. vs. Nebraska, 217 U. S. 196; Great Northern R. Co. vs. Minnesota, 238 U. S. 430; Great Northern R. Co. vs. Cahill, 253 U. S. 71; (and other cited cases), expenditures, directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In Citizens Savings & Loan Association vs. Topeka, 20 Wall. 655, and Cole vs. LaGrange, 113 U. S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In Myles Salt Co. vs. Ibernia and St. M. Drainage District, 239 U. S. 478, the exaction was held unlawful, though imposed under the guise of assessment for alleged betterments. —And this Court has many times warned that one person's property may not be taken for another private person without a justifying public purpose, even though compensation be paid. See Hairston vs. Danville and W. R. Co., 208 U. S. 598; Rindge Co. vs. Los Angeles County, 262 U. S. 700, Cincinnati vs. Vester, 281 U. S. 439."

Citizens Savings & Loan Association vs. Topeka, 20 Wall. 655, 87 U. S. 655, involved the authority of the Kansas legislature to enact a statute authorizing cities to issue bonds to aid manufacturing. The Court, speaking through Mr. Justice Miller, held that such statute was invalid, in that it authorized municipalities to which it applied, by issuing bonds or loaning their credit, to take the property of citizens under the guise of taxation to pay these bonds, and to use it to aid enterprises of others which were not of public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain. Significantly, the Court there said:

"To lay with one hand the power of government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises

> and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

So, also, is the application of an urban redevelopment statute which permits the taking of a citizen's real property under the guise of blight removal when no such blight exists in fact.

II.

The administrative application of the Urban Redevelopment Law of Pennsylvania to Plaintiff-Appellant's property violates the federal constitution because:

A. Plaintiff-Appellant's property and the 23 acre area of which it is a part are not "blighted" under the terms of the Urban Redevelopment Law of Pennsylvania; i. e.

1. The area is *not* inadequately planned.
2. The area has *not* defective design and arrangement of the buildings.
3. The area has *not* faulty street or lot layout.
4. The area is *not* being devoted to an economically undesirable use.
5. The area is *not* being devoted to a socially undesirable use.
6. The area is *not* in any sense an area which, under the provisions of the Urban Redevelopment Law, can be properly declared to be a "bligthed" area.

Thus does the Complaint (Par. 17) (page 11) succinctly spell out and deny categorically that the *very* jurisdictional prerequisites to any certification by any "Planning Commission" exist in this case. Thus does the Complaint put at issue for factual determination whether or not the conditions, the City Planning Commission found in its Certification, really exist.

This is not an attack upon the discretion or judgment of the Planning Commission; is not an attempt to substitute Plaintiff's opinions, or even those of any Court, as to whether or not it is a good idea to exercise eminent domain in this case; is not an attempt to dispute in this case the necessity or expediency of exercising eminent domain. Plaintiff declares, by proper pleading, that the area is *not* blighted; that the specific statutory items upon which a finding of "blight" depend are *not* present in this case. Introduction of proof as to these allegations would not involve mere evidence of mistake of judgment on the part of the Planning Commission, rather it would go directly to the statutory basis for the application of the challenged legislation to any of this area. Not a single voice has been heard to say that if the specific items which go to make up "blight" did not exist, the attempted exercise of eminent domain under this legislation would be constitutional.

B. The city planning commission's finding or certification of "blight" in this case is arbitrary and capricious and without basis in fact or law: i. e.

1. Its findings are over three years old with no supplementary findings despite changed conditions.
2. Its findings were arrived at without a public hearing; without taking testimony of any property owner or tenant in the area or of any person.
3. Its findings were arrived at *solely* upon obtaining data from another City agency concerning street changes; by determining the number of separate ownerships and dimensions of lots; by determining some buildings have blank interior walls; some had lodgers on upper floors; by determining certain improvements had been made, using an incomplete list; by finding a reduction in *land* values *only* during a 12 year period from 1933 to 1945.
4. Its findings ignored the great change in the character and value of the area due to the acquisition

by the State of the "Point Park" area, being the 36 acres to the West of the area, the subject of this litigation.

5. Its findings ignored the fact that assessment rolls of the City do not accurately reflect the value of any of the properties in the area and with *no evidence* that, in making its certification of "blight", any standard or measure of economic use was considered save only reduced revenue to City; it ignored the increased value of all downtown Pittsburgh real estate due to growth of commerce in the past 5 years.

6. Its findings were arrived at with no attempt to define or measure or deduce from any evidence how or by what means it found faulty lot or street layout or inadequate planning or how, or in what manner or in what degree the area certified differed from similar areas in downtown Pittsburgh, or even that it differed in any respect.

Thus does the Complaint (Par. 16) (page 8 to 11) succinctly spell out many of the acts or omissions of the City Planning Commission from which its arbitrariness and capriciousness can be determined. Thus does the Complaint put at issue for factual determination just what the City Planning Commission did do or failed to do in certifying a tremendously valuable commercial acreage in the heart of Pittsburgh's famed "Golden Triangle" as "blighted." The cumulative effect of competent proof of these allegations, expanded and buttressed by detailed evidence (oral, documentary and pictorial), would illustrate impressively the abject failure of the City Planning Commission to perform its duty under the legislation in question.

C. The defendants, Urban Redevelopment Authority of Pittsburgh and the Equitable Life Assurance Society of the United States have contracted in violation of the provisions of the Urban Redevelopment Law and even have wholly ignored the "Certification of Blight" of the City planning Commission.

1. The contract exempts from any taking lands and buildings in the area, now devoted to the same uses and purposes as the other lands and buildings proposed to be taken, with absolutely no finding that the exempted properties, from any standpoint under the Urban Redevelopment Law, are not "blighted", or are not characterized in use, appearance, or value in the least degree differently from the lands and buildings to be taken (cf Note 1)

2. Under the contract of redevelopment, The Equitable Life Assurance Society of the United States is obligated *only* to tear down existing structures on about *one-fifth* of the 23 acre area and build thereon 3 (18 story) buildings to be owned by it, leased or sold by it at its own profit and from which any of the public could be barred by it.

NOTE 1. ANALYSIS OF EXEMPTED PROPERTIES

A. Stanwix Parking Garage, open 3 floor structure, capable of handling far less automobiles than the Pittsburgh Parking Garage in the same block, which latter facility is a modern, entirely off-street *closed* structure providing daily "in and out" service to 650 cars.

B. The Wabash Building, being a triangular stone structure built prior to 1900, at the corner of Liberty Avenue and Ferry Street, now devoted to offices of the Commonwealth of Pennsylvania.

C. The City of Pittsburgh's "Central Police Station" on Water Street which now will be contiguous to the new "Point Park" under construction by the State of Pennsylvania.

D. The Acme Enterprises on Water Street which is a commercial firm in no wise different than any of a dozen properties to be taken.

E. The Pittsburgh Press, the community's largest newspaper, which will now have its place of delivery of giant paper rolls and its great press machinery operating immediately contiguous to the new "Point Park."

F. The Follansbee Steel Corporation Building on the Boulevard of Allies which is a very old brick structure.

G. The Hostetter Building at Water and Ferry Streets, an old 3 story brick structure devoted to commercial uses.

H. The Heyl & Patterson Building, one of the oldest firms facing the new Pittsburgh Monongahela waterfront on Water Street.

3. Only if and when The Equitable Life Assurance Society is ready (a condition which might never exist) will any of the remaining 80% of the 23 acre tract be affected and until that time, although condemned by eminent domain, not one thing will be done to said area, nor one use changed.

4. If and when ready, another one-fifth of this area will be planted in trees and shrubs. This area is not involved in the area on which the new structures are to be erected and is a taking for aesthetic purposes *only* which has been condemned by Pennsylvania's Supreme Court as an unconstitutional use of eminent domain. *(Pennsylvania Mutual Life Insurance Co. vs. Philadelphia,* 242 Pa. 47.)

5. As to another small segment, it is to be deeded to the City of Pittsburgh to relocate Liberty Avenue although there is absolutely no authority in the Urban Redevelopment Law to take land for street purposes, sufficient authority already vesting in the City for such purposes under admittedly valid legislation.

6. As to a segment comprising 25% of the area known as District "B" (Complaint page 73 a) it is to be developed for private off-street parking. This is a use of the area which the City Planning Commission in finding that "blight" existed characterized as "resulting private open space has been used for automobile parking as an apparently expedient interim use of uncertain duration." This is the very use to which the land is now being put by its present private owners.

7. As to the remainder of the area (District "D" Complaint page 73 a), it will be devoted to private off-street parking, which use now exists thereon, or it will be transferred to the Pittsburgh Public Parking Authority or to the City for street purposes. Both the Public Parking Authority and City have admittedly valid authority to exercise eminent domain to erect municipal parking facilities or to lay out or improve streets. Neither of these purposes is one which is in any way authorized by the Urban Redevelopment Law involved in this litigation.

Thus does the Complaint (Par. 9-11-18-19 and 23) (pages 4-5-12-13-14) succinctly spell out many of the acts, omissions and deliberate violations of the defendants from which an unconstitutional administration of the Urban Redevelopment Law can be found.

Thus does the Complaint put at issue for factual determination how and by what means and through what omissions, evasions and violations of this law, defendants are arbitrarily and capriciously effecting the unconstitutional seizure of Plaintiff-Appellant's property.

In their motion to affirm, defendants urge the proposition that they have not, by a motion to dismiss, (which is the action of the District Court appealed from) admitted that the so-called "ultimate" facts or "conclusions" of the City Planning Commission are arbitrary, principally because the Certification of "Blight" of said Commission (Complaint pages 30 a to 45 a) refutes any finding that it acted arbitrarily or capriciously. Similarly, defendants cite much of the opinion of the Allegheny County Court of Common Pleas in the Duff's Iron City College case (see Appendix B of defendants' motion to affirm).

They urge that notwithstanding the precise allegations summarized in A, B and C herein, that the mere attaching, for the convenience of the Court, of the certification (Complaint pages 30 a and 45 a) voids the entire Complaint and, in effect, expunges the right of action. It is interesting to speculate on the technique defendants would have adopted were said Certification to have been omitted from the Complaint.

Much also is made of the fact that no allegation appears which states that the procedure established under the

questioned legislation was not followed by all the defendants.

These were the arguments which our local Common Pleas Court reverted to and adopted in dismissing the Complaint in the Duffs-Iron City College case, *supra*. Actually, these were but opportunistic "outs" for a local Court. What really prompted that Court's decision was defendant, The Equitable Life Assurance Society's argument through counsel that:

> "time is running out on this improvement and that unless all the properties necessary to be included in the redevelopment area are secured before June 1, 1950, the parties to the contract are in danger of cancellation" (Motion to Affirm, page 13)

Defendant's counsel was more direct than the Court even recalls for in his argument he stated:

> "I am authorized by my client to state that if this Bill is not dismissed *forthwith*, it will consider withdrawing from the project entirely."

That this was no legal argument but instead a threat to the Court itself, and indirectly to the citizens of Pittsburgh, defendant's counsel well knew. Naturally, the taking of testimony and the incidents of an equity proceeding would take time. No, the hundreds of people to be uprooted by this action must not be permitted to have their day in Court. Principally, what counsel meant was that, prior to such an undertaking, i. e. building 3 (18 story) office structures, it wanted absolute assurance of tenancy and it had assured on its own behalf its prospective tenants of occupancy in the summer of 1951. So the press of time in favor of a multi-million dollar commercial transaction was argued and accepted as a reason for denying judicial review of the conduct of the defendants. Time alone defeated the constitutional guaranties attempted to be asserted. Defend-

ants studiously refrained from advancing this argument in the Federal District Court.

It is unfortunate that the inferences inherent in these assertions of Plaintiff-Appellant have to be suggested. But it is of supreme importance in considering the equities of the participants in this litigation. Defendants' argument necessarily suggests Plaintiff-Appellant has been dilatory in asserting her rights. Since the certification of "blight" was in 1945 and considering the preparation of the subsequent Redevelopment Proposal (Complaint pages 1 a to 12 a and Exhibit "A" thereto), it might be thought by a casual observer that Plaintiff-Appellant should have acted sooner. There are three complete answers to this:

1. There was nothing public about the Certification of "Blight" in 1945 and although the establishment of a historic "Point Park" had been discussed continually as a civic aim of Pittsburgh, the taking of 23 acres for commercial development by private investors on the fringe of this "monument to freedom" was not considered, at least publicly until 1949.

2. Under the very law defendants derive their authority to act, nothing can be done by anyone until City Council has approved the project. As pointed out earlier in this Brief such approval was given January 27, 1950. Even then nothing can be done until a Redevelopment Contract is executed and in this case this was not done until February 14, 1950. To suggest that action should have been initiated in advance of councilmanic approval is to suggest that that body's approval was a foregone conclusion and thus arbitrary itself.

3. Up until actual condemnation proceedings begin, under Pennsylvania law, Plaintiff-Appellant's remedy was by a Bill in Equity to enjoin the conduct of defendants. But until February 14, 1950, there was nothing a Court could enjoin as there was no threatened taking of property and no irreparable damage to anyone. The Schenck case (364 Pa. 31) which was the friendly test case which contained no challenge to the conduct

of the defendants was heard without testimony on January 5, 1950, 22 days in advance of Council's approval of this project. No objection that it was premature was raised by these same defendants. Yet in the Duffs-Iron City College case *(supra)* and in this case, defendants in their Motion to Dismiss raised and argued the point that Plaintiff-Appellant's remedies and Duffs-Iron City's as well, were sought prematurely in equity for the reason that the same constitutional objections could be raised in the condemnation proceedings, which conceivably might not reach a judicial forum until the fall of 1950 or early in 1951.

The inescapable fact is that defendants do not want and, in fact, fear judicial examination of their conduct. At every step they have stifled legitimate inquiry. By now, the date of this Brief, June 26, 1950, and certainly by the time your Honorable Court acts on the motion before it, a full judicial hearing could have been achieved and the validity and sufficiency of Plaintiff-Appellant's proof obviously sustained or completely negatived. Plaintiff-Appellant and those property owners associated with her in trying to assert their constitutional rights have been subjected to villification and humiliation. Defendants, through pretrial depositions, attempted to elicit proof that large building owners outside of the affected area, and fearful of loss of tenants, were contributing to the expenses of her suit; information which the depositions so conclusively proved false that defendants dropped the proceedings and made no further mention of them.

Defendants further attempted to prevent inclusion of pictures of most of the affected 23 acre area in the record, pictures which had been submitted for the convenience of the District Court. The only pictures defendants desire shown are those of the 36 acre tract acquired through voluntary transactions by the State of Pennsylvania for the "Point Park."

The foregoing are mentioned only to acquaint your Honorable Court with important and contributory background in this litigation.

The certification attached to the complaint (pages 30 a to 45 a) is of itself evidence of arbitrary and capricious action on the part of the City Planning Commission.

Returning to the crux of defendants' argument on this phase, it is appropriate first to consider what the City Planning Commission failed to find existed in this 23 acre area, of the conditions enumerated in the Urban Redevelopment Law as constituting "blight."

By failing to find the following to exist in the area it inferentially found that the area was:

(a) Not unsafe.
(b) Not unsanitary.
(c) Not consisting of inadequate or over-crowded condition of the dwellings therein.
(d) Not to have a lack of proper light and air and open space.
(e) Not to have defectively designed or arranged buildings.

It found only:

(a) Inadequate planning of the area.
(b) Faulty street and lot layout.
(c) Excessive land coverage.
(d) Economic and social undesirable land uses.

It found the foregoing by paying "lip service" to the letter of the law it was administering, but by entirely ignoring the spirit and overall purpose of that law. Any close scrutiny of these proceedings clearly indicates that with the "Point Park" in mind the City administration became committed to do something about the 23 acres which would abut said Park and the Urban Redevelopment Law became

an acceptable instrument by which to accomplish this objective.

Careful reading of the Certification suggests that it is argumentative, philosophic and rhetorical rather than factual. It begins with its conclusion and then advances arguments in support of same, for it begins:

> "It is reasonable to accept for evaluation as a potential redevelopment area" * * * then describing its metes and bounds (Complaint page 31 a)."

It refers to the complete occupancy of the train shed and station of the Wabash Railroad (Complaint page 32 a). At present, there is no train shed, tracks or station, all having been eliminated by fire and now devoted to vital off-street parking and, indeed, as indicated earlier, to *be continued* in the same use. The station mentioned is the Wabash Building which (Note 1 B *supra)* is exempted from the proposed condemnation. It then carefully distinguishes between the "Point Park" area of 36 acres, by terming it the "Westerly Part of the Potential Redevelopment Area" and devoting but 2 pages to it (Complaint pages 45 a to 47 a), since it was then known that the State would acquire it for the Park, and the 23 acre area abutting it, which it terms "Easterly Part of the Potential Redevelopment Area" and to which it devotes 13 pages (Complaint pages 33 a to 45 a). As to this "Easterly Part" * * * it first describes the boundaries, which of course determines nothing; it then describes the streets, sidewalks and widths thereof, which equally determines nothing. Indeed 7 of these streets are major traffic arteries in downtown Pittsburgh. It then (Complaint page 36 a) lists street changes since 1784. It is difficult to see how, of itself, this list can be authority for finding a faulty street layout. To begin with the same can be said of the entire downtown section of Pittsburgh. But an examination of the maps (Complaint pages

49 a and 73 a) reveals as adequate a street layout as can be imagined. The Court's attention is directed to the fact that under the proposed condemnation all the streets in light dotted lines will be eliminated; and, it further should be mentioned, that the express highways appearing on both river fronts are already in use. It then (Complaint pages 37 a to 39 a) discusses the physical dimensions of the lot ownerships, concludes them inappropriate for a modern central business district, and states that any change in street pattern would require considerable widening of roadways and sidewalks. The relevancy of this reasoning is highly questionable when it is recalled that the Urban Redevelopment Law contains no authority to use eminent domain for street purposes. It then decides there is a haphazard process (Complaint page 39 a) and concludes that such process * * *

> "are from the beginning headed toward the obsolescence * * *" and "obsolescence is a factor in blight."

Not only is the word "obsolescence" not used in the Urban Redevelopment Law, nor any word connoting it, but no obsolescence was found factually to exist in the area. Continuing (Complaint page 39 a) it discusses lack of natural light and ventilation, but though that is one of the conditions enumerated in the Urban Redevelopment Law as constituting "blight," the condition was not listed as one found by the Planning Commission as existing in this area in its certification (Complaint page 16 a). Recognizing that its discussion so far could be applied with like aptness to the rest of downtown Pittsburgh, the Planning Commission (Complaint pages 40 a and 41 a) carefully argued that greater building density elsewhere is of no significance. Further continuing, (Complaint pages 41 a and 42 a) it discusses certain uses of buildings with no mention or listing of uses building by building and complains of a few lodgers in certain upper floors. In the whole area today, the only

floors occupied by lodgers are in buildings which have been owned by the defendant, City of Pittsburgh, since 1945.

Further, it lists major building improvements up until March 1946, with no attempt to show what improvements have been inaugurated and completed in the 4 years just ended and with no finding that the buildings, now present in the area, are in need of any improvement or are dangerous, unsafe or unsanitary, or differ from any buildings in the downtown area in any respect.

Finally, it contains a list showing *only* land value reductions from 1933 to 1945 in excess of the whole City area, with no attempt to examine values at present and wholly ignoring the vital fact that the lack of flood control had for years rendered this area, unlike any other area in downtown Pittsburgh, susceptible annually to devastation from high water. For example, it was this area which was completely inundated by the flood catastrophe of 1936. Now that increasing flood control facilities have lessened this grave annual danger to Plaintiff-Appellant and the owners in the area, and have rendered their land more valuable and desirable, and after improving their properties following these flood control measures, they are threatened with its loss through eminent domain and its transfer to a larger private user which would provide the defendant City with more tax revenue.

To say that a brief, superficially considered and argumentative certification, such as is attached to the Complaint, can, *by being immunized from judicial scrutiny*, form the basis for the taking of 23 acres in the heart of one of the largest metropolitan centers in the nation is to stretch the policy and legislative intent of the Urban Redevelopment Law to ridiculous lengths. It renders nugatory long established constitutional concepts of the ownership and enjoyment of private property.

The certification attached to the complaint (pages 30 a to 45 a) completely ignored and studiously avoided any discussion or revelation of what conditions in the area really are and consequently is arbitrary and capricious.

An administrative body charged with duties under legislation must perform its duties fully with due regard to the spirit of the legislation it is charged with executing. It must exercise a scrupulous regard to the correctness and completeness of the findings it may be required to make. At the initial argument in this case, before convening of the Statutory Court, the Solicitor of defendant City acknowledged that the Urban Redevelopment Law was a far reaching extension of the use of eminent domain. This is its first application in Pennsylvania. Consequently, the City Planning Commission was faced with grave responsibilities in discharging its duties.

Two factors must be borne in mind in considering this case:

(a) This legislation, like similar legislation in other states (cf Note 3 to Jurisdictional Statement) primarily is aimed at urban slum removal and restoration of truly decadent areas, where private capital is unable to accomplish the task without the aid of eminent domain. That such was the intent of the Urban Redevelopment Law of Pennsylvania clearly appears from Justice Stern's opinion in the Belovsky v. Redevelopment Authority case (357 Pa. 329) when at page 338, he said:

"The Urban Redevelopment Law closely parallels the provisions of the Housing Authorities Law * * * the fundamental purpose of both these Acts was the same, namely, the clearance of slum areas" * * * and at page 339 where he stated "Unless our government can carry out such measures" * * * "our cities must continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young, and, which contributing little to the tax income of the municipality, consume an excessive proportion of its revenues because of the extra services required for police, fire and other forms of protection."

Not a shred of evidence is disclosed in the proceedings of the defendants under this Act in this case from which any of the conditions considered by Justice Stern could be found to exist in the 23 acre area.

(b) It is the *removal of the blight* not the subsequent use, however desirable or advantageous, which meets the constitutional requirement (Belovsky vs. Redevelopment Authority of Philadelphia, 357 Pa. 329 at page 340). As to 80% of this area, no removal or change of any use is contemplated.

Although there has been no testimony taken in these proceedings, which to date have consisted of arguments arising from preliminary Motions, no Court could intelligently consider summary disposition of this case without some idea of what activities and structures and uses now are being carried on or exist in the 23 acre area involved. Obviously, at any hearing on the merits of this case, such evidence would be competent to consider whether or not the properties are "blighted" under the Act in question and whether or not the Planning Commission had acted arbitrarily and capriciously. The following information partially attempts to portray actual conditions in the area and to indicate some of the factors the Planning Commission ignored or failed to consider in its challenged certification of "blight".

In the nine block area comprising the 23 acres involved in this litigation are dozens of businesses presently providing gainful employment to hundreds of individuals. The gross return on these businesses annually runs into millions of dollars, and the present market value of the real estate and buildings involved approximates $20,000,000.00. In this area are:

a. two modern type major parking garages capable of handling daily traffic in excess of 1,000 cars

b. several restaurants, including Pittsburgh's famous "Womens' Exchange"

c. a modern, skyscraper, building devoted to physicians and dentists offices known as the Professional Building, which alone, brings its owners a net annual income of approximately $70,000.00

d. the headquarters offices of several minor steel and engineering firms such as Follansbee Steel & Heyl and Patterson.

e. the Hotel Mayfair, a landmark in downtown Pittsburgh, upon which thousands of dollars has been spent in modernization in recent years

f. the building of one of Pittsburgh's largest civic group, The Congress of Womens' Club

g. buildings and shops of merchants, material suppliers and other legitimate business firms whose premises are maintained in the best order and appearance

h. the oldest business college in America, Duffs-Iron City College, providing graduate and professional training and education to six hundred students annually

i. a modern structure, of entirely acceptable architectural design devoted to the relief and care of the poor, famed throughout Western Pennsylvania as the "Society for the Improvement of the Poor

j. the building of one of the foremost interior decorator firms in Pittsburgh; Andrew Gamble, Inc.

k. one of the two modern medicinal supply and drug houses in downtown Pittsburgh exclusively serving physicians and dentists

l. the largest chapter of the Benevolent Protective Order of Elks which is quartered on Penn Avenue in the area in a completely renovated structure, the renovation of which recently involved an expenditure in excess of $60,000.00

m. the main plant of Pittsburgh's largest newspaper, the Pittsburgh Press

n. one of the largest commercial art galleries in the City, Wunderleys

o. several blocks of sorely needed downtown off-street parking facilities (earlier pointed out in this Brief to be continued in the same use after its acquisition by the new private owner)

Interspersing this area are four of downtown Pittsburgh's main traffic arteries: the Boulevard of Allies, width

80 feet: Liberty Avenue, width 80 feet: Penn Avenue, width 60 feet: Ferry Street, width 70 feet, and the two new express river front highways, Water Street and Duquesne Way. The foregoing represents, fairly, a far truer picture of the area than that revealed in the Certification of "Blight." The conclusion is obvious that, desiring greater tax revenue, the City approached The Equitable Life Assurance Society of the United States and that company, desiring always good investment opportunities, upon being assured that, through the use of the challenged Urban Redevelopment Law, its land acquisition cost would be limited, agreed to build at least three new office buildings and acquire the area for its own profit. The constitutionality of these proceedings, it is again asserted, do not depend upon more valuable buildings being erected, or upon greater tax revenue to the City, or upon more exclusive types of uses, it depends upon *the removal of actual "blight"* (Belovsky vs. Redevelopment Authority of Pennsylvania, 357 Pa. 329, *supra*) and if there be *no* "blight" *there can be no taking.*

III.

Plaintiff-Appellant has a right under the law and decisions of the Federal Courts to have judicial inquiry of the proceedings of the Defendants taken under the Urban Redevelopment Law of Pennsylvania. Reliance of the specially constituted district court on the case of U. S. ex rel. T. V. A. vs. Welch (327 U. S. 546) in dismissing the complaint was erroneous.

It would be presumptious of counsel to insist that the "Welch" case overthrew one of the oldest and firmly countenanced principles of the judiciary of this country, namely, that of judicial review of the acts of other agencies of government in appropriate instances and in legitimate is-

sues arising between such agencies and individuals. Rather counsel feels that the public use in the "Welch" case was so apparent as to have resulted in the strongly worded opinion of the majority.

A.

Analysis of the "Welch" case.

The Court, it is respectfully submitted, found that the area to be condemned, while not actually submerged by the reservoir, was actually a part of the watershed. The Court, speaking through Mr. Justice Black said:

> "Left in private hands it could be used to frustrate some of the objectives of T. V. A. legislation."

In the light of the fact that the overall need of the T. V. A., in constructing the Fontana Dam (which gave rise to the condemnation involved) was:

> "to meet pressing power needs for war production" (page 548).

it is clear that a vital public purpose was involved in condemning the land for the future protection of the dam and its watershed. The Court reviewed the broad scope of T. V. A. and properly found the taking to fall within its declared purposes. Considered as a case on the conception of a "public use" question it is distinguishable on its facts from the case at bar. It dealt with 44,000 acres of mountainous woodland and the objections of isolated owners; whereas, here the problem is the uprooting of a highly developed commercial urban community with numerous owners and many valuable enterprises.

All the majority opinion did was to emphasize that great deference must be given the decision of the administrative body seeking to condemn as to whether or not it is for a public purpose. The fact that no case is recalled where a

taking upheld under state law as for a public purpose was later held to violate the Fourteenth Amendment does not vitiate the rule of law that under that amendment what is a public purpose is a judicial question for the ultimate decision of the federal judiciary.

While concurring in the holding that the taking was for a public purpose, the two concurring opinions of Mr. Justice Reed (in which the Chief Justice joined) and of Mr. Justice Frankfurter, reaffirmed the doctrine that a claim that a taking is not "for public use" is open for judicial consideration, ultimately by the Supreme Court of the United States. Mr. Justice Reed said:

> "* * * the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen" * * * It is only the "necessity or expediency" of the taking which cannot be reviewed judicially. (page 557 and cases cited.)

B.

Analysis of cases cited in majority opinion in "Welch" case.

Further, it is respectfully submitted, the cases cited in the majority opinion in the "Welch" case do not controvert this doctrine of judicial review of "public use." These cases were:

1. *U. S. vs. Gettysburg Electric Railway,* (160 U. S. 668).

There, the taking was to preserve the battlefield of Gettysburg and the Court said:

> "* * * any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them and which is

germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid."

Far from denying judicial review the Court here did judicially review the purpose and found it public.

2. *Hairston vs. Danville & Western Rwy. Co.*, (208 U. S. 598).

There, the taking was by a railroad for increased spur trackage facilities in the growing city of Martinsville, Virginia and the Court said:

"The condemnation * * * in this case has been held by the Courts of Virginia to be authorized" (page 605) Yet it went on to say:

"We assume that if the condemnation was for private purposes it is forbidden by the Fourteenth Amendment." (page 605) and

then did judicially review the "use" for it further said:

"We proceed to consider whether the uses of the spur track for which the land was taken were private, and therefore such uses for which a taking by the right of eminent domain is forbidden * * *"

"The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question." (page 606)

The Court expressly negatived the idea that it would not review such a question in an appropriate case by saying:

"We must not be understood as saying that cases may not arise where this Court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain." (page 607)

3. *Madisonville Traction Co. vs. Mining Co.*, (196 U. S. 239).

In the "Welch" case the quotation cited of this case was from the *minority* opinion. Actually, in this case the question was whether or not a controversy existed which would

warrant removal of the cause to federal court. The Court in generally discussing the case said:

> "It is said, however, that when it is proposed to take private property for public uses, the question of appropriation is one primarily and exclusively for the State to determine. There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the Government, National or state, except for purposes which are of a public character * * * *Any state enactment in violation of these principles is inconsistent with the due process of law prescribed by the Fourteenth Amendment* * * *" (page 251) (Italics supplied)

4. *Old Dominion Co. vs. U. S.,* (269 U. S. 55).

There it was held that a military purpose arising out of the First World War was a public purpose and the Court emphasized, as it always has, that very great weight must be accorded the intent of Congress; not that it had no power to review the "public use" question.

5. *Case vs. Bowles,* (327 U. S. 92) and *U. S. vs. New York,* (326 U. S. 572).

These cases did not deal with the doctrine of judicial review of eminient domain "public use" takings and are not believed apposite in this case.

6. *Kohl vs. U. S.,* (91 U. S. 367).

This case is the leading case deciding the right of the United States to condemn land itself for public purposes, in that case the use was to erect a post office an admitted public purpose from any point of view. Even so the Court said:

> "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another." (pages 373-374)

7. *Brown vs. U. S.*, (263 U. S. 78).

There a reservoir project of the United States created a situation requiring three-fourths of a town of 1500 inhabitants to move or be flooded out. To alleviate the emergency hardship it was proposed to condemn land nearby and move the town thereto. The Court held the taking to be so closely connected with the acquisition of the flood area and so necessary to carrying out the public use of the reservoir system that it was for a public use despite the fact that the land taken would eventually come into the ownership of other private persons. The Court said:

> "The circumstances of this case are so peculiar that it would not be surprising if no precedent could be found * * *" (page 83)

The Court carefully distinguished this case, on the finding of paramount necessity to an entire community, from the Opinion of the Justices' case (204 Mass. 607) cited earlier in this Brief as well as in the Jurisdictional Statement, saying:

> "The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation."

Finally this Court's attention is directed to the case of U. S. vs. Carmack, (329 U. S. 73), recently decided, as to which Judge Learned Hand, in a dissenting opinion in U. S. vs. N. Y., (160 Fed. 2d. 482), said, that he felt sure not only was it his opinion but that of his colleagues, that the opinion in the "Carmack" case by strong inference indicated that

the United States Supreme Court did not intend by the "Welch" case to immunize other agencies of government from judicial review in cases of this nature.

Plaintiff-Appellant respectfully submits that the foregoing analysis of the "Welch" case and of the cases cited therein conclusively demonstrates that her right, in a properly pleaded case as this, to a judicial review in the Federal Courts of the "public use" question under the Fourteenth Amendment exists without question. The "Welch" case did not controvert that right nor did the Court which rendered the opinion therein intend so to do.

Plaintiff-Appellant, for the reasons herein set forth, respectfully submits that the Defendants-Appellees' Motion to Affirm should be dismissed. Under Rule 7 of your Honorable Court, Plaintiff-Appellant further respectfully requests that oral argument on this Motion to Affirm be granted.

Respectfully submitted,

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